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No. 41

Supreme Court of the United States

OCTOBER TERM, 1940

C. E. STEVENS COMPANY, a corporation; C. E. STEVENS TACOMA COMPANY, a corporation; and C. E. STEVENS COMPANY OF OREGON, a corporation, *Petitioners,*

vs.

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UPON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' BRIEF

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THE ARGUS PRESS, SEATTLE

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PETITIONERS' BRIEF

OPINIONS OF THE COURTS BELOW

The opinion of the District Court for the Western District of Washington, Northern Division, sustaining respondents' demurrer to the second amended complaint without leave to amend, was filed April 26, 1939, and has not been officially reported (R. 54). The judgment of the said court sustaining the demurrers and dismissing the complaint without leave

to amend was signed and filed on June 8, 1939 (R. 56).

The opinion of the Circuit Court of Appeals for the Ninth Circuit was filed February 19, 1940. It is officially reported in 109 F. (2d) 764, and appears in the record at page 81.

JURISDICTION

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U.S.C.A., Sec. 347 (a)).

2. With reference to the facts set forth in the second amended complaint, this proceeding to review the decision of the Circuit Court of Appeals for the Ninth Circuit involves the validity and scope of the Act of 1890, c. 647, 26 Stat. 209, 15 U.S.C.A., Sec. 1, *et seq.* (popularly known as the Sherman Act). The pertinent provisions of that Act are quoted at length in the footnote.[1]

---

[1] The pertinent provisions of the Sherman Anti-Trust Act involved are as follows:

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5000, or by imprisonment not exceeding one year, or by both said

3. The jurisdiction of this Court is invoked because the decision of the Circuit Court of Appeals for the Ninth Circuit conflicts with the decisions of this Court and of other Circuit Courts of Appeal and the question involved is one of national importance to business and the public interest.

4. The date of the judgment of the Circuit Court of Appeals for the Ninth Circuit herein sought to be reviewed is February 19, 1940. Certiorari was granted by this Court on May 6, 1940.

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[1] Continued.

punishments, in the discretion of the court. (July 2, 1890, c. 647, Sec. 1, 26 Stat. 209).

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, Sec. 2, 26 Stat. 209).

"Section 7. Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, c. 323, Sec. 4, 38 Stat. 731.)"

STATEMENT OF THE CASE

The controlling issue involved in the present case is whether the actions of the respondents, as set forth in the second amended complaint, constitute a restraint or monopoly of commerce, and a conspiracy and attempt to monopolize commerce, in violation of the Act of 1890, c. 647, 26 Stat. 209, 15 U.S.C.A. (*supra*, 2).

This action for treble damages under the Sherman Act was instituted February 27, 1933, in the District Court for the Western District of Washington, Northern Division. Demurrer for want of facts and lack of jurisdiction was submitted and overruled, but at the same time certain motions were granted resulting in the filing of an amended complaint. Upon answer thereto and reply, the cause stood at issue awaiting assignment for trial for an extended period during which time the Circuit Court of Appeals for the Ninth Circuit decided *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742.

Thereupon respondents moved for a reconsideration by way of motion to dismiss, which, after hearing, was granted with leave to amend, resulting in the filing of the second amended complaint on March 30, 1938. This was followed by demurrers upon the part of the respondents which were sustained without leave to amend on the authority of the *Special Site* case, and judgment of dismissal entered on June 8, 1939 (R. 56), from which appeal was taken to the Circuit Court of Appeals for the Ninth Circuit.

On February 19, 1940, the Circuit Court affirmed the judgment of the District Court in an opinion by

Judge Wilbur, who wrote the *Special Site* decision, with Judge Healy concurring in the result (R. 81). Judge Haney, who had concurred in the *Special Site* case, wrote a vigorous dissent upholding the sufficiency of the complaint and disapproving the application of the *Special Site* decision to this case (R. 97).

As the factual situation is rather involved, two diagrams are offered in the appendix (*post*, following page 62) in an effort to graphically present the relations of the parties and the way in which the conspiracy charged operated against petitioners. However, because of overlapping functions, it is impossible to illustrate all aspects of the matter and the diagrams are offered with the understanding that they do not portray all operations with exact detail.

The complaint pleads and the demurrer admits the following facts: Petitioners are owners and operators of plants used for outdoor advertising displays in Washington and Oregon (R. 3, 45, 47). Respondent, Foster & Kleiser Co., is engaged in the same business on a national scale (R. 6-8) and controls ninety per cent. of the outdoor advertising in the states comprising the Pacific Coast Area (R. 36). The remaining respondents are, Restop Realty Co., a corporation, owned and controlled by Foster & Kleiser Co., and its officers and directors, and various officers, stockholders and employees of the two corporations (R.8-10).

The outdoor advertising business, as carried on by the parties to the action, is a nation-wide business, which in several essential respects depends upon commerce between the states. The advertiser generally contracts with the lithographer (practically all of

whom are located in Kentucky, Ohio and Illinois) for posters to be used in the advertising campaign. Advertising agencies solicit contracts of advertisers for the placing of the posters upon billboards (R. 17). These advertising agencies are organized into the National Outdoor Advertising Bureau, Inc. (R. 27). This bureau contracts with bill posting companies called "plant owners," who control sites for bill boards, for the execution of the contracts secured by the agencies (R. 28-29). Since 1927 certain bill posting companies have been organized into the Outdoor Advertising Association of America, Inc., a consolidation of the Associated Bill Posters and Distributors of the United States and Canada and the Outdoor Advertising Association of America (R. 21). These associations grant to their members a single "franchise" for billboard display in each community where a member plant is located, and direct all advertising which they control to such member plant. The Association refuses to buy posters or lithographs from lithographers who sell posters and lithographs to anyone for display on independent display plant owners' billboards. Petitioners are such independents. The Association also refuses to post billboard advertising on the boards belonging to its members for advertisers who permit their advertising to be displayed on billboards belonging to such independent display plant owners (R. 21-26). Foster & Kleiser Co. controls 600 franchises and the General Outdoor Advertising Company, Inc., incorporated in 1924 in furtherance of the conspiracy, controls 1,000 franchises (R. 34). Foster and Kleiser Investment Company, a corporation, whose stock is

owned by respondents, George W. Kleiser and Walter P. Foster, purchased 50,000 shares of stock of General Outdoor Advertising Company, Inc., for $1,000,000 and George W. Kleiser became a director of the latter company (R. 32-33). The Outdoor Advertising Association of America, Inc., is dominated and controlled by the General Outdoor Advertising Company and by Foster & Kleiser Co. (R. 34-35). The respondent, George W. Kleiser, was a director and for many years president of the Outdoor Advertising Association of America, Inc. (R. 34). The petitioners are "independent" operators, kept from membership in and the benefits of the Outdoor Advertising Association of America, Inc., by the conspirators (R. 24).

The outdoor advertising business of the petitioners and respondents is operated on a national scale. Foster & Kleiser Co. not only posted the posters and lithographs upon its billboards after they had been delivered to a town for that purpose but, throughout the country, it directly solicited and executed contracts for such services. As part of such contracts, it procured the necessary posters and lithographs for its patrons and shipped them from one state to another. Such interstate shipment was for the primary purpose of posting them on specified billboards supplied by respondents under the terms of the contracts. The same may be said as to the designs and stencils shipped by or to respondents for use in preparing painted displays upon their boards. Foster & Kleiser Co. is a national concern engaged in a nation-wide business (R. 6-8).

Respondents intentionally entered into a nation-wide

conspiracy, the purposes of which are to monopolize the outdoor advertising business in the Pacific Coast Area; to prevent petitioners and other independent plant owners from engaging in the posting business, from securing and executing contracts for national posting business, and from securing posters with which to conduct such business; to prevent lithographers from supplying posters to petitioners and others; and to prevent petitioners and others from securing facilities to furnish an advertising service to advertisers (R. 18-19).

The general plan, scheme and conspiracy is designed and operated to effect such monopoly by:

1. Control of the business of national outdoor advertising at its source through control of the agencies and organizations placing the same.

2. Prevention of and restraint upon shipment of posters to independent plants in interstate commerce.

3. Prevention of and restraint upon the furnishing or sale of posters to advertisers for shipment in interstate commerce to or for display upon independent plants.

4. Prevention of and restraint upon the soliciting, securing and completing of outdoor advertising contracts, as heretofore defined and explained, by the petitioner companies and other competitors, by means of various unfair, predatory and illegal acts, which are referred to as local predatory acts, designed to prevent petitioners from securing posters or facilities to furnish an advertising service to national advertisers (R. 19-20).

The conspiracy disclosed is substantially identical

with that outlined in the opinion in *Ramsay Co. v. Associated Bill Posters*, 260 U. S. 501, 43 S. Ct. 167, 67 L. ed. 368, which this Court held to be within the scope of the Sherman Act. The respondents admitted, in their brief below, that the complaint alleges a conspiracy within the *Ramsay* decision (R. 87). The majority opinion of the Circuit Court of Appeals apparently recognizes that the *Ramsay* decision would govern this case but for its view that the acts which injured the petitioners' business and prevented the obtaining of contracts or posters were not "done with the primary intention of monopolizing or burdening the free movement of goods in interstate commerce" (R. 92).

As a result of the respondents' control over the Outdoor Advertising Association of America, Inc. (R. 21-26) and the National Outdoor Advertising Bureau, Inc. (R. 30-31, 33-34), the conspiracy with General Outdoor Advertising Company, and the acts effectuating the conspiracy (R. 32-36, 36-42), practically all national outdoor advertising business in the Pacific Coast area was and is placed for execution upon the plants of Foster & Kleiser Co., to the exclusion of independent plants, including the petitioners' plants, and interstate commerce in outdoor advertising, posters, paint designs, stencils and contracts for outdoor advertising was and is thereby monopolized, restricted, curtailed and unreasonably restrained (R. 35-36).

These various acts enabled the respondents to bring about a monopoly greatly damaging petitioners' business. Petitioners are unreasonably restrained in their trade and competition with respondents in the outdoor

advertising business, all of which is injurious to petitioners and excludes them from fair competition in such trade and commerce (R. 23-26, 31, 33-34, 35-36, 41-42). Because of such inability to compete in the trade and commerce, petitioners have been damaged in that their business has been rendered unprofitable and their profits have diminished and they have suffered loss and damage thereby (R. 43-49).

Diagram No. 2, attached to this brief (*post*, appendix following page 62) graphically describes the operation of an "independent" outdoor advertising business not a party to but subject to pressure from the conspiracy. Note particularly that the efforts of the conspirators were exerted against the C. E. Stevens Company in three general ways:

A. Advertising agencies were forced to leave C. E. Stevens Company and join the National Outdoor Advertising Bureau as a result of the threats and efforts of Foster & Kleiser Co., the Bureau itself, and the Outdoor Advertising Association of America, Inc., thus diverting business from petitioners;

B. The lithographers refused to furnish their posters, lithographs, and services to C. E. Stevens Company because Foster & Kleiser Co., the Bureau and the Association threatened to boycott them if they dealt with such independent, thus restricting shipments and service to the advertising public; and

C. Local predatory acts were directed to the destruction of the C. E. Stevens Company and the other petitioners, resulting in crippling their business facilities so as to impair their ability to obtain and execute

contracts involving the interstate shipment of posters and lithographs.

SPECIFICATION OF ERRORS

I. The Circuit Court of Appeals erred in holding that since the main object of the conspiracy is to gain control of intrastate activities of the outdoor advertising business, the intent to accomplish and the actual accomplishment of that purpose by restraint upon interstate commerce through preventing posters and lithographs from other states reaching petitioners or by so crippling petitioners' business facilities as to destroy their ability to obtain and execute contracts involving the interstate shipment of posters and lithographs is not within the scope of the Sherman Act.

II. *Foster & Kleiser Co. v. Special Site Sign Co.* (C.C.A. 9) 85 F. (2d.) 742, cert. den., 299 U. S. 613, 57 S. Ct. 315, 81 L. ed. 452, is not controlling because the facts of the instant case are substantially different from those of the reported case. The Circuit Court erred in holding it is controlling.

III. The outdoor advertising business, as factually explained and set forth in the second amended complaint, substantially involves interstate commerce, and the Circuit Court erred in not holding that such is the case. A conspiracy to restrain or monopolize such business directly restrains and monopolizes interstate commerce and is within the scope of the Sherman Act.

IV. The Circuit Court erred in not following the decisions of this Court extending the scope of the application of the Sherman Act to cover not only

interstate commerce, as such, but intrastate activities which "directly" affect such commerce.

SUMMARY OF ARGUMENT

The Circuit Court of Appeals erred in holding that since the main object of the conspiracy was to gain control of the outdoor advertising business by monopolizing the display of posters, the intent to accomplish and the actual accomplishment of that purpose by restraint upon interstate commerce through preventing posters from other states reaching petitioners or by so crippling petitioners' business facilities as to destroy their ability to obtain and execute contracts involving the interstate shipment of the posters is not within the Sherman Act.

Firstly, the conspiracy set forth in the complaint was not limited to acts which might be termed intrastate in operation. The conspirators entered into a nation-wide agreement with the other two powerful combines in the business. Officers of Foster & Kleiser Co. actively participated in the management of the General Outdoor Advertising Company, in which its two stockholders had invested $1,000,000. Through this cooperation, respondents successfully intimidated advertisers and lithographers all over the country to the end that 90% of the national outdoor advertising business in the Pacific Coast Area was denied the benefits of free competition and diverted directly to them, to the serious injury of petitioners' business. This portion of the conspiracy was interstate in conception and execution.

Secondly, while the ultimate purpose of the conspirators was to benefit themselves financially by controlling the local posting of lithographs, their specific intent was to bring this about by restricting and suppressing competition throughout the country. The marketing areas were divided and advertisers and lithographers were forced to abandon petitioners and do business with respondents. In this way, respondents intended to secure all national and local business for themselves by diverting the interstate shipments of posters and lithographs from petitioners to themselves and thus forcing petitioners out of business.

The facts of the instant case differ substantially from those of *Foster & Kleiser Co. v. Special Site Sign Co.* (C.C.A. 9) 85 F. (2d) 742, cert. den. 299 U. S. 613, 57 S. Ct. 315, 81 L. ed. 452. The Circuit Court erred in adopting that decision as controlling in this case.

The outdoor advertising business, as factually set forth in the complaint, substantially involves interstate commerce. A conspiracy to restrain or monopolize it and its actual restraint and monopoly, directly restrains and monopolizes interstate commerce within the prohibition of the Sherman Act.

The scope of the application of the Sherman Act has been extended by the decisions of this Court to cover not only interstate commerce, as such, but all local transactions which are inextricably mingled with and directly affect the interstate transactions. A conspiracy to restrain or monopolize such local operations, or their actual restraint or monopoly, is within the prohibition of the Sherman Act.

ARGUMENT

I. The Circuit Court of Appeals Erred in Holding That Since the Ultimate Object of the Conspiracy is to Gain Control of Intrastate Aspects of the Outdoor Advertising Business by Monopolizing the Display of Posters, the Intent to Accomplish and the Actual Accomplishment of That Purpose by Restraint Upon Interstate Commerce Through Preventing Posters and Lithographs From Other States Reaching Petitioners, or by so Crippling Petitioners' Business Facilities as to Destroy Their Ability to Obtain and Execute Contracts Involving the Interstate Shipment of Posters and Lithographs Is Not Within the Scope of the Sherman Act.

In affirming the judgment entered by the District Court the Circuit Court of Appeals stated (R. 92):

> "In all these cases it is held that when acts intrastate in character are relied upon to bring a case within the scope of the Sherman Anti-Trust Act, *supra*, such acts must be done with the primary intention of monopolizing or burdening the free movement of goods in interstate commerce. As we have stated, it is clear from a reading of the complaint as a whole that the purpose of the conspiracy alleged was not a monopoly of the outdoor advertising business in its interstate aspects, that is, the control of poster or lithograph trade but, rather, the control of the local business of securing advertising contracts and billposting."

The quoted holding of the Circuit Court is in error for three reasons.

A. The first is that the Court failed to appreciate that the complaint charges a violation of Section 1

of the Sherman Act, by a conspiracy directly operating upon interstate shipments, as well as a violation of Section 2, by monopolization of the nation-wide business of soliciting and executing, by interstate shipment, the contracts to post such shipments. Under Section 1 the conspiracy and the resulting restraint upon interstate commerce are sufficient. The intent actuating the conspiracy is immaterial. It is only in the application of Section 2 to particular facts that the intent of the conspirators in monopolizing or attempting to monopolize the interstate commerce may be material. The rule is succinctly stated by Judge Haney in his dissenting opinion:

> "If, by necessary operation of the conspiracy, there is an actual restraint the statute is violated, the actual intent being immaterial. * * * *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49; *Paramount Famous Corp. v. United States*, 282 U. S. 30, 49."
>
> *C. E. Stevens Co. v. Foster & Kleiser Co.*, 109 F. (2d) 764, 772 (R. 106).

Admittedly (R. 90) the complaint pleads a violation of Section 1 by conspiracy to restrict national outdoor advertising in its broadest sense and in all of its aspects, involving generally the flow of commerce between parties residing in different states, and particularly movements of posters, lithographs, stencils and other physical paraphernalia connected therewith. It is not necessary to *stop* the interstate movement to give rise to a liability; it is sufficient that it is *diverted or restricted* to certain desired channels, which was the purpose of this conspiracy.

Ramsay Co. v. Associated Billposters, 260 U. S. 501, 43 S. Ct. 167, 67 L. ed. 368.

Judge Wilbur holds that, while the complaint does state a conspiracy to restrain interstate commerce, such restraint was not the primary object of the conspiracy. Therefore any injury to petitioners is not compensable under the Sherman Act because it results from a primary aim to monopolize the intrastate aspects of the business (R. 90). In considering this point it is important to remember that it is not essential that either the petitioners' business which is damaged or the business of the respondents constitute interstate commerce.

> "There is nothing in the Sherman Act confining the right to recover under Section 7 to persons engaged in interstate commerce or whose business or property injured is interstate commerce. If there were any doubt on the subject, it would be instantly laid by the case of *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 396. The person injured must be engaged in a business directly, or at least not remotely, affected by the conspiracy complained of."
>
> *United Copper Securities Co. v. Amalgamated Copper Co.*, 232 Fed. 574, 577.

> "It matters not that the injury may be due to the conduct of those engaged in intrastate operations."
>
> *Schechter v. United States*, 295 U. S. 495, 544, 55 S. Ct. 837, 79 L. ed. 1570, 1587.

It is also important to remember that wherever the terms "independents", "independent plant owners", "independent plants" and "independent companies"

are found in the complaint they include and are intended to embrace the appropriate petitioner (R. 19).

Illustrating that the complaint does clearly and definitely plead the existence of the conspiracy to monopolize the business by restraint upon interstate commerce and the resultant restraint and injury to petitioners' business, we call attention to some of the allegations. Respondents, through the Outdoor Advertising Association of America, Inc. (hereinafter called the Association) and its predecessors, which they controlled by means of their agreement with General Outdoor Advertising Company (hereinafter called the General Company) (R. 32-34), intending to prevent petitioners' obtaining posters from other states, refused to post lithographs if the lithographers sold lithographs to petitioners. This refusal successfully intimidated and coerced the lithographers. As a result the free movement in interstate commerce of the posters, lithographs, printed designs, and contracts for outdoor advertising were monopolized and unreasonably restrained, and petitioners were obstructed and hindered in their business and prevented from giving a full and adequate outdoor advertising service to their customers, and competition was lessened (R. 23, 25-26). In the same manner advertisers were forced to deal with respondents and not with petitioners (R. 23-26, 36). An essential part of petitioners' business involved arranging for the interstate shipment of posters, lithographs, paint designs and stencils, and receiving and displaying them. Every effort of the respondents through the Association (R. 21-26), the National Outdoor Advertising

Bureau (R. 26-29, 30-31, 33-36), the community of interest and actual physical and financial contact with the General Company (R. 32-36) and the so-called local predatory acts (R. 36-42) was directed toward accomplishing a monopoly of the outdoor advertising business in the Pacific Coast area by directly preventing posters and lithographs being shipped from other states to petitioners or by so crippling petitioners' business and facilities that no one would want to ship posters and lithographs to them because they would be unable to render proper and adequate service.

By burdening and restraining interstate commerce these efforts did accomplish the monopoly just as the respondents planned and they control over ninety per cent. of the business in the Pacific Coast Area. This monopoly was effected because, as planned, the interstate commerce in posters was burdened and restrained (R. 23, 26, 29, 31, 34-36, 37-44).

The conspiracy and the acts furthering it did "work to the damage of" petitioners (R. 44-48).

Judge Haney concurred in the opinion in *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742, which held there was no direct causal connection between the acts of the conspirators and the injury complained of. The majority treats that case as controlling here. In considering whether a direct causal connection between the acts of the conspirators and the injurious effect upon petitioners is alleged in this complaint, Judge Haney states:

> "The majority, in my opinion, has confused the 'purpose' of the conspiracy with the means

used to 'accomplish' it. The fact that the conspiracy was accomplished by acts which if separately considered, would be intrastate, is immaterial. 'It is the effect upon commerce, not the source of the injury, which is the criterion.' Each case presents its distinctive questions arising from facts therein involved, as to whether the effect is direct or indirect.

"The complaint contains many allegations that the accomplishment of the conspiracy 'obstructed and hindered' appellants in their business; and that 'the free movement in interstate commerce of posters, lithographs, painted designs and contracts for outdoor advertising was monopolized, attempted to be monopolized, and was unreasonably restrained.'. It was also alleged that 'in almost every case' the poster advertising contracts were 'agreements between the parties thereto to ship posters, lithographs, designs, stencils and other advertising material from one of the states of the United States to another state.' It seems apparent to me that the complaint contains sufficient allegations to show obstructions to the shipments mentioned, and therefore a decrease in interstate commerce. In view of *Santa Cruz Co. v. Labor Board*, *supra*, and *Edison Co. v. Labor Board*, 305 U. S. 197, 221, I think it inevitably follows that the effect was 'direct'." (R. 108)

B. The second reason why the quoted holding is in error is that it is based upon an incomplete analysis of the conspiracy and the means adopted to accomplish it. It is obvious that the conspirators realized the most effective method of accomplishing their monopoly of the outdoor advertising business and the acquisition of the power to fix unreasonable prices

in such business was to gather to themselves all the national contracts which, *per se*, entailed the shipment of posters and lithographs from one state to another. To control this interstate shipment they entered into a nation-wide agreement with the other two powerful combines in the business. Through purchasing stock in the General Company and electing the respondent, George W. Kleiser, to the board of that company (R. 32-33) respondents assumed a position where it was easy for them to obstruct and hinder the interstate shipment of the posters and lithographs by applying pressure on lithographers in the Middle West and on advertisers all over the country. In view of such a complex and successful plan operating throughout the United States respondents cannot maintain that their conspiracy was limited in its application to the intrastate aspects of the outdoor advertising business.

C. The third and most important error in the quoted passage is in confusing the means used by the conspirators with their ultimate ends. This is apparent from the majority's use of the word "intent" as the equivalent of the word "purpose" or "object." The ultimate "purpose" or "object" of the conspirators in all cases involving violations of the Sherman Act, is to benefit themselves materially by unreasonably limiting competition and thus acquiring the power unreasonably to fix prices, a matter which may be primarily local (R. 106). In that sense the ultimate purpose or object in the *Stevens* case is the same as it was in *Ramsay Co. v. Associated Billposters*, 260 U. S. 501, 43 S. Ct. 167, 67 L. ed. 368. How-

ever, an examination of the cases cited by the majority in support of its holding (R. 90-93) discloses that the intent with which the restraint upon interstate commerce is effected is not to be confused with the ultimate purpose of the conspirators.

In *Ramsay Co. v. Associated Billposters*, 260 U. S. 501, 43 S. Ct. 167, 67 L. ed. 368, the conspirators were not only billposters, as in the instant case, but the association they formed to assist in the accomplishment of their conspiracy was a predecessor of the Association in this case (R. 21) and was created for like purposes. They combined and conspired to monopolize the outdoor advertising business in their respective localities and to dominate and control all trade and commerce in posters within such limits. Thus, as in the instant case, their main object or purpose was to monopolize the outdoor advertising business. They *intended* to bring this about by dominating and controlling the interstate trade in posters. Thus in the *Ramsay* case and in this, the Stevens complaint, the intent to accomplish the monopoly by restraining interstate commerce is the same. To carry out the conspiracy the Associated Billposters adopted the same restraints and burdens upon the interstate trade, as such, and upon their competitors. Plaintiffs, in the *Ramsay* case, like petitioners here (R. 4, 15-17) solicited outdoor advertising contracts and prepared, designed, purchased and displayed lithographs and posters. As a result of the conspiracy petitioners were prevented from competing in the markets, and their business was restricted and unprofitable. In discuss-

ing the case this Court said at page 511 of the decision:

> "The court below held: 'The business of the solicitors is to send their customers advertisements to be posted on billboards in various towns and cities throughout the country. Assuming that this business is, as between them and their customers, interstate commerce, we are clear that after the posters have arrived at destination, the posting of them by billposters is a purely local service, not directly affecting, but merely incidental to, interstate commerce. We think this follows from the decision of the Supreme Court in *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40.'
>
> "*We cannot accept this view.* The alleged combination is nation-wide; members of the Association are bound by agreement to pursue a certain course of business, designed and probably adequate materially to interfere with the free flow of commerce among the states and with Canada. As a direct result of the defendants' joint acts, plaintiff's interstate and foreign business has been greatly limited or destroyed. *Hopkins v. United States* is not applicable. There the holding was that the rules, regulations, and practices of the association directly affected local business only. The purpose of the combination here challenged is to destroy competition and secure a monopoly by limiting and restricting commerce in posters to channels dictated by the confederates, to exclude from such trade the undesired, including the plaintiff, and to enrich the members by demanding noncompetitive prices. The allegations clearly show the result has been as designed,—that the statute has been violated and

plaintiff's business has suffered." (Emphasis supplied)

Ramsay Co. v. Associated Billposters, 260 U. S. 501, 511, 43 S. Ct. 167, 67 L. ed. 368, 370.

In *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association*, 274 U. S. 37, 47 S. Ct. 522, 71 L. ed. 916, the company had ceased to operate a closed shop and employ the union's members, all stonecutters. The union called a national strike directing all of its members to refuse to work on any job where the stone had been quarried or worked upon by non-union men. The resultant walk-offs affected building operations purely local in character. The union raised the argument that its primary purpose was to unionize the cutters and carvers at the quarry. This Court held:

"Respondents' chief contention is that 'their sole and only purpose * * * was to unionize the cutters and carvers of stone at the quarries.' And it may be conceded that this was the ultimate end in view. But how was that end to be effected? The evidence shows indubitably that it was by an attack upon the use of the product in other states to which it had been and was being shipped, with the intent and purpose of bringing about the loss or serious reduction of petitioners' interstate business, and thereby forcing compliance with the demands of the unions. And, since these strikes were directed against the use of petitioner's product in other states, with the plain design of suppressing or narrowing the interstate market, it is no answer to say that the ultimate object to be accomplished was to bring about a change of conduct on the part

of petitioners in respect of the employment of union members in Indiana. A restraining of interstate commerce cannot be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint."

Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association, 274 U. S. 37, 47, 47 S. Ct. 522, 71 L. ed. 916, 921.

In the second *Coronado* case (*Coronado Coal Company v. United Mine Workers of America*, 268 U. S. 295, 45 S. Ct. 551, 69 L. ed. 963) the evidence indicated that, while the strike was directed against production at the mine to protect the wage scale of union miners, there was also an *intent* to accomplish this ultimate purpose by restraining interstate commerce. By destroying the mines the production of non-union coal was to be stopped. It could not be shipped to other states "where it would by competition tend to reduce the price of coal and affect injuriously the maintenance of wages for union labor in competing mines." In discussing the question this Court said:

"The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. *But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-trust Act.*" (Emphasis supplied)

Coronado Coal Company v. United Mine Workers of America, 268 U. S. 295, 310, 45 S. Ct. 551, 69 L. ed. 963, 970.

The majority opinion in the Circuit Court of Appeals also calls attention to *Local 167, I. B. T., etc., v. United States*, 291 U. S. 293, 54 St. Ct. 396, 78 L. ed. 804. Marketmen, who acted as wholesalers of the continuous stream of live poultry pouring into New York, purchased the poultry and sold it to retailers after interstate transit had ceased. They organized a Chamber of Commerce with the ultimate purpose of monopolizing the business and increasing prices. They engaged in many acts to control the handling, the sales and the price of the poultry. They denied that they intended to restrain or did interfere with interstate commerce. In approving the granting of the injunction this Court held:

> "Appellants' contention that there is no proof that they intended to restrain or did interfere with interstate commerce has no merit.
>
> "The evidence shows that they and other defendants conspired to burden the free movement of live poultry into the metropolitan area. It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers the movement of the poultry ceases to be interstate commerce. * * * But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce. * * * The

Sherman Act denounces every conspiracy in restraint of trade including those that are to be carried on by acts constituting intrastate transactions. * * * The interference by appellants and others with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted operate substantially and directly to restrain and burden the untrammelled shipment and movement of the poultry while unquestionably it is in interstate commerce."

Local 167, I. B. T., etc., v. United States, 291 U. S. 293, 297, 78 L. ed. 804, 808, 54 S. Ct. 396.

The recent decision of this Court in *Apex Hosiery Company v. Leader*, ... U. S. ....., 60 S. Ct. 982, 84 L. ed. 913, in its discussion of the background, theory and purpose of the Sherman Act, contains a great deal that is very significant and appropriate upon consideration of the facts and issues of this case.

"In 1890 when the Sherman Act was adopted there were only a few federal statutes imposing penalties for obstructing or misusing interstate transportation. With an expanding commerce, many others have since been enacted safeguarding transportation in interstate commerce as the need was seen, including statutes making conspiracies to interfere or actual interference with interstate commerce by violence or threats of violence felonies. It was another and quite a different evil at which the Sherman Act was aimed. It was enacted in the era of 'trusts' and of 'combinations' of business and of capital organized and directed to control of the market by suppression of competition in the marketing of goods

and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

"For that reason the phrase 'restraint of trade' which, as will presently appear, had a well-understood meaning at common law, was made the means of defining the activities prohibited. The addition of the words 'or commerce among the several states' was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes. *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 434, so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected interstate commerce. Because many forms of restraint upon commercial competition extended across state lines so as to make regulation by state action difficult or impossible, Congress enacted the Sherman Act, 21 Cong. Rec. 2456. It was in this sense of preventing restraints on commercial competition *that Congress exercised 'all the power it possessed.'* " (Emphasis supplied)

Apex Hosiery Company v. Leader, ... U. S. ....., 60 S. Ct. 982, 990, 84 L. ed. 913.

"In seeking more effective protection of the public from the growing evils of restraints on the competitive system effected by the concen-

> trated commercial power of 'trusts' and 'combinations' at the close of the nineteenth century, the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such restraints wherever they occur in or affect commerce between the states. They extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law, and they gave both private and public remedies for the injuries flowing from such restraints."
>
> *Apex Hosiery Company v. Leader*, ... U. S. ....., 84 L. ed. 913, 60 S. Ct. 982, 994.

In discussing the oft-repeated defense that a conspiracy is not within the scope of the Sherman Act because its effect upon interstate commerce is indirect, it was said:

> "It was thus made apparent that in saying that 'indirect obstructions' to commerce were not condemned by the Sherman Act where the conspiracy is not directed at that commerce, the Court was not seeking to apply a purely mechanical test of liability, but was using a shorthand expression to signify that the Sherman Act was directed only at those restraints whose evil consequences are derived from the suppression of competition in the interstate market, so as 'to monopolize the supply, control its price or discriminate between its would-be purchasers.' *And in*

speaking of intent as a prerequisite to liability under the Act where the restraint to interstate commerce is 'indirect' it meant no more than that the conspiracy or combination must be aimed or directed at the kind of restraint which the Act prohibits or that such restraint is the natural and probable consequences of the conspiracy." (Emphasis supplied)

Apex Hosiery Company v. Leader, ... U. S. ....., 60 S. Ct. 982, 1001, 84 L. ed. 913.

In applying these principles to the instant case, it is well to keep in mind that we are dealing with a demurrer treated as a motion to strike. Almost without exception the cases discussed in the *Apex* decision were before the Court, as was the *Apex* case, after trial. The record of the evidence in those cases showed the exact nature and extent of each restraint and the intent with which it was effected. Here we must accept the allegations of the complaint in place of the abstract of the evidence at the trial.

Conceding, for the purpose of argument, that there is no specific direct interference with interstate commerce pleaded in this case, against what was the conspiracy described in the complaint directed? Both petitioners (R. 4-6) and respondents (R. 6-12) were and are engaged in a business national in scope, involving interstate solicitation, entering into and execution of poster and painted bulletin and wall display contracts. The contracts contemplate and the parties to this suit actuate the shipment of posters, lithographs, designs and stencils from third persons in other states to their "plants" in the Pacific Coast Area in fulfillment of the contracts (R. 4-12). Peti-

tioners and respondents, therefore, were engaged in such interstate business and commercial transactions. Can it be doubted that this was a conspiracy to restrain free competition in such interstate market, tending "to monopolize the supply, control its price or discriminate between its would-be purchasers," squarely within the Sherman Act and violative of its provisions?

Apex Hosiery Company v. Leader, ... U. S. ....., 60 S. Ct. 982, 84 L. ed. 913.

Foster & Kleiser Co. and the remaining respondents admittedly entered into a conspiracy (R. 18, 87). The purpose of that conspiracy is plainly set forth in these words:

"VIII.

"The purpose and object of said plan, scheme and conspiracy was to attempt to monopolize and by various acts and means taken individually, in concert with the organizations and by and through the means and methods hereafter set forth, to monopolize in the Pacific Coast Area all branches of the outdoor advertising business, which business has hereinabove been described, and particularly to prevent plaintiff and other independent plant owners from engaging in the posting business, from securing and executing contracts for national posting business, from securing posters with which to conduct either national or (15) local posting business; to prevent lithographers from supplying posters either to independent plant owners or advertisers who were customers of independent plant owners; and to prevent independent plant owners from securing adequate, sufficient or proper plant facilities

whereby said independent plant owners could furnish a satisfactory advertising service to advertisers. Wherever used in this complaint, the terms 'independents,' 'independent plant owners,' 'independent plants' and 'independent companies' include and are intended to embrace the appropriate plaintiff company.

"The general plan, scheme and conspiracy was to effect such monopoly by:

"1. Monopoly of the business of national outdoor advertising at its source through control of the agencies and organizations selling the same.

"2. Prevention of and restraint upon shipment of posters to independent plants in interstate commerce.

"3. Prevention of and restraint upon the sale of posters to advertisers for shipment in interstate commerce to, or display upon independent plants.

"4. Prevention of and restraint upon the soliciting, securing and completing of outdoor advertising contracts, as heretofore defined and explained by the plaintiff company and other competitors, by means of various unfair, predatory and illegal acts more fully set forth hereinafter in paragraph XV." (R. 19)

"IX.

"The defendant, Foster & Kleiser Co., at all times from and after its organization, has been continuously and now is furthering and carrying out said plan, scheme and conspiracy.

"All the acts, occurrences and facts hereinafter set forth were done and performed by said defendant, Foster & Kleiser Co., and Restop Realty Co., and their agents and employees, for

the purpose of furthering, carrying out and completing said plan, scheme and conspiracy." (R. 20)

We have previously reviewed at some length the methods employed by the conspirators to accomplish their purpose and the manner in which they did accomplish it (*supra*, 5-11).

This is a sufficient statement of claim under the Federal Rules of Civil Procedure.[1]

An allegation of the purpose or intent with which an act or series of acts is done is an allegation of fact good upon demurrer. 49 C. J. p. 57, §51. Intent may be averred generally. Federal Rules of Civil Procedure, Rule 9 (b).

This analysis of the case cited in the majority opinion as authority for the quoted passage (*supra*, 14) indicates that in each case, as here, while the *ultimate purpose or object* was to monopolize a business in its intrastate aspects, there was an *intent* to bring this about by a restraint upon interstate commerce. And,

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[1] "RULE 8. GENERAL RULES OF PLEADING.

"(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain. . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . .

"(e) Pleading to Be Concise and Direct; Consistency. (1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required."

Federal Rules of Civil Procedure, Rule 8 (a) and (e) (1).

in each case, the presence of this intent was the element which brought the case within the scope of the Sherman Act. The majority has failed to distinguish between ultimate purpose and the intent to accomplish such purpose by a restraint upon interstate commerce forbidden by the Sherman Act.

The conclusion that the instant conspiracy and the acts effectuating it violated the provisions of the Sherman Act is further strengthened by the fact that not only was the conspiracy "aimed or directed at the kind of restraint which the Act prohibits" but such restraint was the natural and probable consequence of the conspiracy.

The pressure brought to bear by the conspirators upon lithographers in the Middle West naturally resulted in their refusing to sell or ship posters or lithographs for posting on the petitioners' boards. To have done so would have lost the lithographers the greater volume of business they did with the conspirators. The same can be said of the threats made to the advertisers. If they were willing to lose valuable mediums of presenting their products to the public, they could continue to advertise on petitioners' boards. But obviously they could not afford to do so.

The natural consequence of the "local predatory acts" was to destroy the petitioners' efficiency as going concerns and lead national advertisers away from them. An advertiser, already threatened by the conspirators, would be quick to see that if he shipped his posters to petitioners for display on their boards the posters might never be displayed because of the effectiveness of the conspirators' illegal campaign against

those very boards. Furthermore, such action on his part would lose him the opportunity to advertise further through respondents' plants. Naturally he would be forced to ship them to the conspirators or dismiss the idea of an advertising campaign.

Similarly, the Association and the Bureau produced, as a natural consequence of their activities, a tightening of the conspirators' grip upon the entire national outdoor advertising business and the direction of the interstate flow of posters, lithographs, designs and stencils in that business. If they were not formed for that purpose, for what were they created? Why were their actions, dictated by the conspirators, constantly directed against the petitioners and other independents? Why the contracts between them and between General Outdoor Advertising Company and Foster & Kleiser Co.? How does it happen that a dummy corporation "invests" a million dollars in the General Outdoor Advertising Company and George W. Kleiser is elected to the latter's board?

Even though it be said that the conspirators were actuated by a desire to promote the interests of the national outdoor advertising business or rescue it from a distressful condition, they are still liable where they have combined to produce restraint upon interstate commerce. *United States v. Socony-Vacuum Oil Co.* ..... U. S. ....., 60 S. Ct. 811, 84 L. ed. 760.

It directly and specifically appears that these efforts accomplished the purpose of the conspirators. The national outdoor advertising business was monopolized. Posters, lithographs, designs and stencils traveled from one state to another, their destinations

dictated and controlled by the conspirators (R. 23, 26, 29, 31, 34-44).

The conspiracy and the acts furthering it damaged petitioners' business (R. 44-48).

It is plain that the conspiracy was intended to limit or destroy free competition in the national outdoor advertising business itself and in the interstate trade and commerce in posters, lithographs, designs and stencils. Its purpose and effect was to monopolize the business of outdoor advertising, to discriminate against independent plants and those desiring to use their services, and to control prices and deprive consumers of the advantages which they derive from free competition. The application of the doctrine of the *Apex* case shows clearly that there has been a violation of the Sherman Act.

Apex Hosiery Company v. Leader, ... U. S. ....., 60 S. Ct. 982, 84 L. ed. 913;

Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295, 45 S. Ct. 551, 69 L. ed. 963 (Second Coronado case);

Bedford Cut Stone Company v. Journeymen Stone Cutters' Association, 274 U. S. 37, 47 S. Ct. 522, 71 L. ed. 916;

Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 S. Ct. 172, 65 L. ed. 349;

Lowe v. Lawlor, 208 U. S. 274, 28 S. Ct. 301, 52 L. ed. 488.

Therefore, it is respectfully submitted that the Circuit Court of Appeals erred in holding that because the ultimate purpose of the conspiracy was to gain control of the intrastate aspects of the outdoor ad-

vertising business by restraining and monopolizing the display of posters, the intent to accomplish and the actual accomplishment of that purpose by means of restraint upon and monopoly of interstate commerce through preventing posters and lithographs from other states reaching petitioners or by so crippling petitioners' business facilities as to destroy their ability to obtain and execute contracts involving the interstate shipment of posters and lithographs are not within the scope of the Sherman Act.

II. *Foster & Kleiser Co. v. Special Site Sign Co.* (C.C.A. 9) 85 F. (2d) 742, Is Not Controlling Because the Facts of the Instant Case Are Substantially Different From Those of the Reported Case.

This Court has held that in the determination of whether or not a particular case falls within the purview of the Sherman Act, each case must be considered on its own facts.

> "We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus in applying its broad prohibitions, each case demands a close scrutiny of its own facts."
>
> *Sugar Institute v. United States*, 297 U. S. 563, 600, 56 S. Ct. 629, 80 L. ed. 859, 876.

The essence of the *Special Site* decision seems to be this: Bill posting, as *alleged in the complaint*, is local in character. Shipments made by the defendant from itself in one state to itself in another state of materials used in bill posting cannot be the subject

of a conspiracy to restrict interstate commerce. The defendant could not conspire with itself. (*Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 745). There were no allegations that the defendant had anything whatever to do with the shipment of posters or their movement in interstate commerce. The transportation of the necessary posters and lithographs in interstate commerce was not alleged to be related to or involved in any way in the defendant's bill posting business. (*Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 745). The parties and activities in that case were substantially confined to the State of California. The theory of the *Special Site* complaint was that if the parties locally displayed posters or lithographs which had been the subject of interstate transportation and the defendant committed local acts of depredation tending to interfere with plaintiff's local display, such acts and interferences, through the resulting effect upon a subject of interstate commerce, constituted a violation of the Sherman Act. (*Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 750). In holding that this theory was erroneous, the court pointed out that the interference with interstate commerce, which is subject to the act, must be direct and not merely an indirect resulting effect. The court was of the opinion that since there were no allegations that defendant had conspired with another to directly restrain transportation between one state and another, or was monopolizing the business so as to produce that direct effect, the local acts of depredation complained of were not violative of the Sherman Act, and that interstate commerce was not involved simply because

posters or other materials were shipped between states by parties with whom the defendant had no relation.

> "In the absence of an allegation of the causal connection between the damage, and the conspiracy to restrict interstate commerce in posters, no cause of action is stated under the Sherman Anti-Trust Act."
>
> *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 754.

In that case the means alleged to have been used to restrain interstate commerce, consisting primarily of local acts of a competitive nature between parties who were residents of the same state, were, the Court said, "adopted to the injury or destruction of the plaintiffs' business in its intrastate aspects," and none of them "are *alleged* to have directly affected the interstate trade in posters or lithographs" (Emphasis supplied).

The situation thus disclosed by the *Special Site* decision falls far short of the nation-wide conspiracy factually alleged in the *Stevens* complaint. Respondents are engaged in business on a national scale (R. 6-8) actively preparing, designing, purchasing and displaying posters and lithographs (R. 15-17). They enter into thousands of contracts actuating the interstate shipment of the posters and lithographs for display upon billboards controlled by them in several states, and in many cases for display upon designated boards (R. 11-12). Respondents entered into and are carrying out a conspiracy to monopolize the outdoor advertising business and this monopoly is intended to be effected by restraint upon the interstate

commerce in posters and lithographs in two respects. The first is to restrain such commerce by utilizing the Association, the Bureau, and the "tie-ups" with the General Company to force lithographers and advertisers to cease sending posters and lithographs to petitioners in the states in which they do business and to send those posters and lithographs to respondents (R. 20-26, 29, 32-36). The second is to institute a series of so-called local predatory acts which will so cripple petitioners' business facilities as to destroy their ability to procure and execute contracts involving interstate shipment of the posters and lithographs so that advertisers will deal only with respondents (R. 18-20, 36-42). These efforts to accomplish the monopoly by restraining interstate commerce are entirely successful as planned by the conspirators. They now control over 90% of the outdoor advertising business in the Pacific Coast Area and have successfully damaged and crippled petitioners' business (R. 23, 26, 29, 31, 34-44).

It is, therefore, respectfully submitted that the Circuit Court erred in holding that *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742, in any sense controls the instant case.

The action of this Court in denying certiorari in *Special Site Sign Company v. Foster & Kleiser Company*, 299 U. S. 613, 81 L. ed. 452, 57 S. Ct. 315, should not be regarded as significant both because of the oft-repeated admonitions of this Court to this effect and also because the order of the Circuit Court of Appeals in that case was not a final one but re-

manded the case with leave to amend and for further proceedings.

III. The Outdoor Advertising Business, as Factually Explained and Set Forth in the Second Amended Complaint, Substantially Involves Interstate Commerce, and a Conspiracy to Restrain or Monopolize It Directly Restrains and Monopolizes Interstate Commerce and is Within the Scope of the Sherman Act.

In a footnote to the opinion (R. 86) the court says:

> "Obviously the securing of local billboard sites and the posting of advertising matter thereon are local transactions. Nor does the fact that billposting contracts are made between persons residing in different states transform the transaction into an interstate one. *Ware and Leland v. Mobile County*, 209 U. S. 405; *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U. S. 436; *Pacific Railways Advertising Co. v. Conrad*, 168 Cal. 91." (*Pacific Railways Advertising Co. v. Conrad*, 168 Cal. 91, 141 Pac. 916).

Strictly speaking petitioners admit that this statement is true so far as it goes. However the cases cited are inapplicable to the situation now before this Court. In none of those cases did the court decide that a nation-wide business of preparing, designing, purchasing and displaying posters and lithographs in the course of which thousands of contracts arose *actuating* the interstate shipment of these posters and lithographs for display on specified billboards was an *intrastate* business not substantially involving interstate commerce. The only cited case which concerned the application of the Sherman Act is *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U. S.

436, 40 S. Ct. 385, 64 L. ed. 649. Only Section 2 of the Act was involved (See *supra*, 14, for distinction between Sections 1 and 2). In that case this Court held that the advertising contracts which the plaintiff advertising agent offered the defendant publisher and which the latter refused to accept had no direct relation to the circulation of the magazines in interstate commerce. That ruling is inapplicable here for the reasons previously stated (*supra*, 20-36).

Further, the *Special Site* case rests its ruling that the billposting business is not interstate in character upon this Court's ruling in *Packer Corp. v. State of Utah*, 285 U. S. 105, 52 S. Ct. 273, 76 L. ed. 643. The latter case involved a state statute prohibiting the posting of tobacco advertising in Utah. It was aimed at the use of the poster *after* it was affixed to the billboard. No facts appeared in that case to support a finding that the defendant was engaged in a business substantially involving interstate commerce, or that its nation-wide illegal combinations had made it substantially interstate in character. These allegations are present in the Stevens complaint. Consequently, the *Packer* decision is inapplicable to this case. It does not generally and finally determine that every outdoor advertising business is stricty intrastate in character.

Contrary to the theory of the *Special Site* complaint and the trial court's instructions therein held to be erroneous (*Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 750) the petitioners herein are not attempting to tie the businesses of petitioners and respondents to interstate commerce through the inter-

state transportation of bills and display advertising matter *by other parties who were direct shippers.*

After discussing the Special Site Sign Company's theory that the outdoor advertising business is, *per se*, interstate commerce, as disclosed by allegations that various materials, used in the business, are transported across state lines, that the business is conducted in several states, and that the products advertised are transported in interstate commerce, the Court concludes in the following words:

> "It follows that the allegations of the complaint that the outdoor advertising business is interstate commerce must be disregarded as a mere conclusion of the pleader, *unsupported by the specific allegations as to the nature of the business*, which is intrastate in character. Therefore, as the outdoor advertising business is not interstate commerce, but is local in character, the theory of the pleader must fail to that extent." (Emphasis supplied)
>
> *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742 at 753.

The distinction between that case and this one is that here the complaint does not allege *as a mere conclusion* that the outdoor advertising business is interstate commerce, unsupported by specific allegations as to the nature of the business. The C. E. Stevens complaint *specifically and factually establishes that the business of national outdoor advertising as involved herein, is so conducted on a national scale as to be interstate commerce.* That allegation is in the following words:

"That plaintiff company has at all times men-

tioned herein engaged in the outdoor advertising business, that is to say, *has been engaged in the solicitation of, entering into, and execution of poster advertising contracts, painted bulletin display contracts, painted wall display contracts and commercial sign contracts from advertisers, representatives of advertisers, or advertising agencies located throughout the states of the United States.* That in almost every case the said contracts are agreements between the parties thereto to ship posters, lithographs, designs, stencils and other advertising material from one of the states of the United States to another state for the primary purpose of posting the said posters or lithographs or painting signs from the designs or stencils upon bill boards or paint panels supplied by the plaintiff company. That it is within the contemplation of all the parties to the said contracts that the posters or lithographs or paintings from designs or stencils be placed or painted upon a stated number and class of billboards or paint panels and, in many cases, that they be placed or painted upon certain specified bill boards or paint panels, and that unless and until they are so placed or painted the said contracts are executory and incomplete. *That in execution of the said contracts the said posters or lithographs have been and are shipped from one of the United States to another state solely to be placed upon a stated number and class of bill boards and, in many cases, to be placed upon certain specified bill boards, which are the property or within the control of the plaintiff company, and are at all times within the contemplation of the parties to the said contracts.* That in execution of the said contracts the said designs, sten-

ills and other advertising materials have been and are shipped from one of the United States to another state solely to be used in painting certain advertising signs upon a stated number and class of bill boards or paint panels and, in many cases, upon certain specified bill boards or paint panels, which are the property of or within the control of the plaintiff company, and are at all times within the contemplation of all the parties to the said contracts. *That, at all times, it is also within the contemplation of all the parties to the said contracts, that unless and until the said posters or lithographs or paintings from the said designs or stencils are placed or painted upon the pre-determined and stated number and class of bill boards or paint panels, as aforesaid, the primary consideration for each entire contract has not been performed and each said contract remains executory and incomplete.* That by thus engaging in the outdoor advertising business the said plaintiff company has been and is engaged in interstate commerce between the several states of the United States." (Emphasis Supplied) (R. 4-6)

Solicitation of outdoor advertising contracts as involved herein, is defined in the complaint in the following words:

"The solicitation of outdoor advertising contracts involves:

"(a) The preparation and submission to advertisers of advertising copy or designs by reproduction, either in print or in paint on signboards, walls, or panels, constructed for that purpose.

"(b) The procurement from lithographers, and

the submission to advertisers, of estimates covering the cost of printing posters;

"(c) The procurement primarily through the association or associations hereafter mentioned, from poster plant and paint plant operators of statistical information concerning the location of poster plants and paint plants in the various towns and cities throughout the United States, as well as the charges for displays thereon, and the submission to prospective advertisers of estimates of the cost of displaying advertising matter on such plants;

"(d) Entering into the contracts, either as principal or as agent for the advertiser, for the purchase of advertising posters pursuant to copy or designs approved by the advertiser, and the subsequent transportation and delivery of the same in interstate commerce from the lithographer to the operators of poster plants located in cities, towns and villages throughout the United States consigned to a stated number and class of billboards and/or paint panels, and, in many cases, to certain specified billboards and/or paint panels for posting in accordance with the instructions of the advertiser;

"(e) Entering into a contract, either as principal or as agent for the advertiser, with operators of poster plants and paint plants, for the display of poster and painted advertising matter which is to be transported in interstate commerce in accordance with the advertiser's instructions;

"(f) Causing the approved copy or designs for painted signs to be transported in interstate commerce from the office or studio of the advertiser or his agent, to operators of paint plants

in the various cities and towns throughout the United States consigned for reproduction on a stated number and class of paint panels, and, in most cases, on certain specified paint panels, in accordance with the advertiser's directions;

"(g) Checking and inspecting the displays of advertising matter on the poster and paint plants which have been selected by the advertiser or by the solicitor on its behalf;

"(h) Making payments to the operators of the poster plants and the paint plants for the use of their plants; and

"(i) Collecting from the advertisers for services rendered." (R. 15-17)

Since these allegations apply to the respondent with equal force (R. 6-8) insofar as national outdoor advertising is concerned, the respondent, Foster & Kleiser Co., actuates the shipment of posters, lithographs, etc., from one state to another and such shipment is a more important element of the business than the mere pasting the poster to the billboard. Further, the contract of outdoor advertising participated in by the respondent, Foster & Kleiser Co., provides for one continuous act from the time the poster leaves the manufacturer until it is actually pasted upon the billboard. These allegations state facts, which were not presented in the *Special Site* complaint, supporting the petitioners' conclusion that the outdoor advertising business was and is interstate in character. Their presence in *Ramsay Co. v. Associated Billposters*, 260 U. S. 501; 43 S. Ct. 167; 67 L. ed. 368, resulted in a decision favorable to the plaintiffs. It is just as specifically alleged that they were solicitors of national advertising. Since

these allegations appear in this complaint, they furnish ample factual support for the petitioners' contention that any conspiracy to restrain or monopolize the outdoor advertising business as involved herein in its *interstate aspect* violates the Sherman Anti-Trust Act. And this is so without regard to whether the business also has its *intrastate aspects*.

> "The crime of restraining interstate commerce through combination is not condoned by the inclusion of intrastate commerce as well."
>
> *United States v. Brims*, 272 U. S. 549; 47 S. Ct. 169; 71 L. ed. 403.

The Supreme Court has held the business of publishing and circulating farm papers to be interstate commerce.

> "The business that is here alleged to have been *damaged* is the publication and circulation of these farm papers. *That business includes the obtaining of advertising, the transportation between States of electrotypes sent respectively to petitioner and respondents by their customers to be used in setting up advertisements* and the transportation of substantial quantities of the papers in interstate commerce. Advertising at compensatory rates is an essential element. The opinion in *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U. S. 436, 64 L. ed. 649, 40 S. Ct. 385, *supra*, assumed that a publishing business such as that now under consideration would amount to interstate commerce. There is no ground for the contention that the evidence in this case is not sufficient to go to the jury on the question of interstate commerce." (Emphasis Supplied)

Indiana Farmer's Guide Pub. Co. v. Prairie F. P. Co., 293 U. S. 268, 276; 55 S. Ct. 182; 79 L. ed. 356, 360.

Essential elements of the Prairie Farmer case were the obtaining of advertising and the transporting between states of electrotypes sent respectively to plaintiff and defendant by their customers to be used in setting up advertisements. The case is distinguished from *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U. S. 436, 40 S. Ct. 385, 64 L. ed. 649, in that the advertising contracts in the *Blumenstock* case involved no movement of goods or merchandise in interstate commerce or any transmission of any intelligence in such commerce.

The General Company, the Bureau, the Association, Foster and Kleiser Company (Foster & Kleiser Co.), Foster and Kleiser Investment Company, George W. Kleiser and others were defendants in a suit for an injunction under the Sherman Act, brought by the United States in the District Court for the Southern District of New York (*United States v. General Outdoor Advertising Co., Inc., et al.*, in the District Court of the United States, for the Southern District of New York, in Equity, No. 46-50; unreported). In the main the petition set forth the particulars of the conspiracy alleged in the instant case. After some evidence had been introduced a consent decree was entered on May 7, 1929. While the petition was dismissed, without prejudice, as to the Association, Foster and Kleiser Company and Foster and Kleiser Investment Company, the conspiracy was held to be within the scope of the Sherman Act and the conspirators were perpet-

ually enjoined from entering into or performing any agreement, *the intent of or effect of which would be to restrain or monopolize the business of soliciting contracts for outdoor advertising displays, or the execution of such contracts.* The conspirators were enjoined from continuing the so-called "local predatory acts" and George W. Kleiser, respondent herein, was forced to resign from the board of the General Company.

The following year a similar petition was filed in the Southern District of California against Foster & Kleiser Company, George W. Kleiser, Walter P. Foster, August F. Lausen, Jr., and Restop Realty Company (*United States v. Foster & Kleiser Company, et al.*, in the District Court of the United States, for the Southern District of California, Central Division, In Equity, No. R-31-M). The very conspiracy about which the petitioners herein complain, was detailed at length in that suit. On March 13, 1931, the court signed a consent decree. The conspiracy was again held to be within the scope of the Sherman Act and the monopoly of and the attempt to monopolize interstate trade and commerce in outdoor advertising was held to be violative of the Act. The conspirators were enjoined from continuing their efforts to monopolize the interstate trade and commerce in outdoor advertising. The decree detailed the "local predatory acts" as important parts of the conspiracy and they were specifically enjoined.

Thus on two different occasions the courts have ruled *that these very conspirators' business of soliciting and executing contracts for outdoor advertising*

displays was interstate commerce and the conspiracy to restrain or monopolize it and its restraint or monopoly was violative of the provisions of the Sherman Act.

Furthermore, it is petitioners' contention that the fact that the outdoor advertising business is considered as intrastate is immaterial in this case. Where the operation of an intrastate business is a part of a conspiracy to restrain and monopolize the outdoor advertising business throughout the country, such operation is itself in restraint of interstate commerce within the scope of the Sherman Act. This point is well discussed in *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344, 42 S. Ct. 570, 66 L. ed. 975.

> "In *United States v. Patten*, 226 U. S. 525, 57 L. ed. 333, 44 L.R.A. (N.S.) 325, 33 Sup. Ct. Rep. 141, running a corner in cotton in New York City by which the defendants were conspiring to obtain control of the available supply and to enhance the price to all buyers in every market of the country was held to be a conspiracy to restrain interstate trade because cotton was the subject of interstate trade, and such control would directly and materially impede and burden the due course of trade among the states, and inflict upon the public the injuries which the Anti-trust Act was designed to prevent. Although running the corner was not interstate commerce, the necessary effect of the control of the available supply would be to obstruct and restrain interstate commerce, and so the conspirators were charged with the intent to restrain. The difference between the *Patten* case

and that of *Ware & Leland v. Mobile County*, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031, illustrates a distinction to be drawn in cases which do not involve interstate commerce intrinsically, but which may or may not be regarded as affecting interstate commerce so directly as to be within the Federal regulatory power. In the *Ware & Leland* case, the question was whether a state could tax the business of a broker dealing in contracts for the future delivery of cotton, where there was no obligation to ship from one state to another. The tax was sustained and dealing in cotton futures was held not to be interstate commerce, and yet thereafter such dealings in cotton futures as were alleged in the *Patten* case, where they were part of a conspiracy to bring the entire cotton trade within its influence, were held to be in restraint of interstate commerce. And so, in the case at bar,—coal mining is not interstate commerce, and obstruction of coal mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce in it, or has necessarily such a direct, material, and substantial effect to restrain it that the intent reasonably must be inferred."

United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344, 410, 42 S. Ct. 570, 66 L. ed. 975, 995.

Thus, in the first *Coronado* case, coal mining was held to be intrastate and a strike directed against production at the mine to protect the wage scale of union miners was not within the scope of the Sherman Act.

However, in the second *Coronado* case (*Coronado*

Coal Company v. United Mine Workers of America, 268 U. S. 295, 45 S. Ct. 551, 69 L. ed. 963) the evidence indicated that, while the strike was directed against production at the mine to protect the wage scale of union miners, there was also an intent to accomplish this ultimate purpose by restraining interstate commerce. This Court concluded that the conspiracy violated the Sherman Act even though coal mining, as such, was intrastate. In discussing the question, this Court said:

> "The mere reduction in the supply to an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. *But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering or moving in interstate commerce, or the price of it in interstate markets, their action is in direct violation of the Anti-trust Act.*" (Emphasis supplied)
>
> *Coronado Coal Company v. United Mine Workers of America*, 268 U. S. 295, 310, 45 S. Ct. 551, 69 L. ed. 963, 970.

IV. The Instant Case is Within the Sherman Act Since the Scope of That Act Has Been Extended by the Several Decisions of This Court Which Hold That Congressional Power Over Commerce Extends to Cover Not Only Interstate Commerce, as Such, But Intrastate Activities Which "Directly" Affect Such Commerce.

The congressional power over commerce is governed by the Constitution, Art. I, Sec. 8.[1] Thus empowered, the Congress passed the Sherman Act, and later the Clayton Act. Acting under the same constitutional power Congress has passed the National Labor Relations Act of July 5, 1935 (49 Stat. 449, 29 U.S.C.A. §151 *et seq.*), the Agricultural Marketing Agreement Act of June 3, 1937 (50 Stat. 246, 7 U.S.C.A. §601, *et seq.*) and the Tobacco Inspection Act of August 23, 1935 (49 Stat. 731, 7 U.S.C.A. §511 to 511q). The scope of each of these acts has been passed upon by this Court.

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893;

National Labor Relations Board v. Fainblatt, 306 U. S. 601, 59 S. Ct. 668, 83 L. ed. 1014;

Santa Cruz Fruit Pack. Co. v. National Labor Relations Board, 303 U. S. 453, 58 S. Ct. 656, 82 L. ed. 954;

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[1] "Section 8. The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states . . ." Constitution of the United States, Art. I, §8; U.S.C.A., Part 1, p. 32.

United States v. Rock Royal Co-Operative, 307 U. S. 533, 59 S. Ct. 993, 83 L. ed. 1446;

Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379, 83 L. ed. 441.

In considering the validity and applicability of the several acts in these cases the Supreme Court announced that the acts extended to cover not only interstate commerce, as such, but *intrastate* activities which directly affect such commerce.

This Court in the first cited case announced what has come to be known as the expanded concept of interstate commerce in the following words:

> "The Congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious actions springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement'; * * * That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' Second Employers' Liability Cases, 223 U. S. 51, 56 L. ed. 345, 32 S. Ct. 169.
>
> "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 37, 57 S. Ct. 615, 81 L. ed. 893, 911.

* * * * * * *

"It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved." 301 U. S. 40, 81 L. ed. 913.

* * * * * * *

"* * * In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because they may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. *When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?* We have often said that interstate commerce itself is a practical conception. It is equally true that inter-

ferences with that commerce must be appraised by a judgment that does not ignore actual experience." (Emphasis supplied) 301 U. S. 41, 81 L. ed. 914.

Where local transactions are so inextricably mingled with and directly affect the admitted interstate transactions they, too, are subject to Federal authority. The local transactions are caught up in the current of interstate commerce or their manipulation is capable of directly affecting, burdening and obstructing the interstate commerce and thus they become subject to Federal regulations. This view is further expressed in the following cases:

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S. Ct. 206, 83 L. ed. 126;

National Labor Relations Board v. Crowe Coal Company, 104 F. (2d) 633, cert. den. *Crowe Coal Co. v. National Labor Relations Board*, 308 U. S. 584, 60 S. Ct. 107, 84 L. ed. 86;

Edwards v. United States, 91 F. (2d) 767;

United States v. Wilshire, 9 F. Supp. 936, aff. 77 F. (2d) 1022;

Can it be said that a strike in the Jones & Laughlin Steel Corporation plant would be any more catastrophic in its effect upon the industrial and business life of the nation than results from these conspirators fastening their grip upon all outdoor advertising in the Pacific Coast Area? All industry and business, great and small, interstate or intrastate, must conform to the conspirators' regulations and policies and pay the prices they ask or see a vast market closed to

their goods. In accordance with the conspirators' dictates, advertisers dare not deal with petitioners or other independents. Petitioners' business disappears. And it is this control the conspirators refer to as purely intrastate.

This Court has indicated in *Interstate Circuit, Inc., et al., v. United States*, 306 U. S. 208, 59 S. Ct. 467, 83 L. ed. 610, that, in circumstances strikingly similar to those in the instant case, the theory of the expanded application of Congressional power over commerce applies in cases involving violations of the Sherman Act.

Under the foregoing decisions of this Court, even if respondents' business and the acts they engaged in to further their conspiracy are intrastate in character, their activities did have a direct effect upon the interstate trade in posters and lithographs. In view of this direct restraint upon that commerce, their illegal intent (which has never been denied by respondents) will be presumed. The injury they have caused petitioners' business is thus compensable under the Sherman Act.

As in *Apex Hosiery Co. v. Leader*, 108 F. (2d) 71, the Circuit Court in the instant case failed to follow the express ruling of this Court in the foregoing cases on the ground that the term "affecting commerce" has a broader connotation than the term "in restraint of trade or commerce among the several states." Its view was:

> "* * * The questions discussed in the cases cited by appellants arising under the National Labor Relations Act have to do with the power of

> Congress to exercise control over activities which separately considered are intrastate but which, because of their close and substantial relation to interstate commerce, have an injurious effect upon it. The right of Congress to deal with these activities is based upon its power to protect interstate commerce when injuriously affected by acts which are local in character. This is an entirely different question than presented here. The question in the case at bar is not the extent of the power of Congress over intrastate activities affecting interstate commerce, but whether or not the conduct complained of is within the scope of the Sherman Anti-Trust Law. The question is what Congress has declared to be illegal under the Sherman Anti-Trust Law. As we have stated, the Supreme Court, in determining what Congress intended to forbid by the enactment of the anti-trust laws, has held that activities, intrastate in character, not motivated by the *primary* purpose of monopolizing or restraining commerce among the several states, are not covered by such laws although such activities might incidentally affect interstate commerce." (R. 94) (Emphasis supplied)

Such a holding ignores, firstly, the fact that all the legislation under discussion is based upon the same constitutional provision and each act seeks to protect the same kind of commerce. There should be no differentiation between the degrees of the commerce that each protects. Secondly, it ignores the definition of the term "affecting commerce" as including "burdening or obstructing commerce," which has always been considered by this Court as synonymous with "restraining commerce." Finally, it ignores

the above-cited decisions of this Court that, irrespective of the terms used in the particular statutes, the intrastate acts complained of had a direct effect upon interstate commerce, even though those acts, separately considered, were local in character.

The Circuit Court proceeded on the theory that in passing the Sherman Act, Congress had exercised less than all its power over interstate commerce under the Commerce clause. But in considering the scope of the Sherman Act in *Apex Hosiery Company v. Leader*, ... U. S. ....., 60 S. Ct. 982, 84 L. ed. 913, this Court again stated that in the sense of preventing restraints on commercial competition, Congress exercised "all the power it possessed," citing *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 434, 52 S. Ct. 607, 76 L. ed. 1204. As has been previously said (*supra*, 53-59) the power Congress possesses to regulate interstate commerce and all intrastate activities affecting it is ably and fully indicated in the recent cases before this Court.

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893;

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197; 59 S. Ct. 206, 83 L. ed. 126;

National Labor Relations Board v. Crowe Coal Company, 104 F. (2d) 633, cert. den. *Crowe Coal Co. v. National Labor Relations Board*, 308 U. S. 584; 60 S. Ct. 107, 84 L. ed. 86;

Mulford v. Smith, 307 U. S. 38, 59 S. Ct. 648, 83 L. ed. 1092;

Santa Cruz Fruit Pack. Co. v. National Labor Relations Board, 303 U. S. 453, 58 S. Ct. 656, 82 L. ed. 954;

United States v. Rock Royal Co-Operative, 307 U. S. 533, 59 S. Ct. 993, 83 L. ed. 1446;

Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379, 83 L. ed. 441.

It is apparent, from what is said in both the majority and the minority opinions in the *Apex* case, that the meaning and extent of "interstate commerce" under the Sherman Act is not more restricted than under the Wagner Act and other similar statutes, and that the application of the Act in that case was defined, not because of lack of effect upon interstate commerce, but solely because the acts complained of were not "the kind of restraint of trade or commerce at which the Act is aimed."

The following quotation from the dissenting opinion in the *Apex* case indicates that the Court as a whole applied the expanded theory of the scope of Congressional power over interstate commerce and intrastate activities affecting it to the Sherman Act cases as well as to those arising under the National Labor Relations Act.

> "The attempt in the court below to distinguish between the use of the word 'affect' in the National Labor Relations Act and the word 'restraint' in the Sherman Act is ineffectual as it fails to take note of the fact that the word 'affect' was construed as purporting 'to reach only what may be deemed to burden or obstruct' interstate or foreign commerce and hence under the

familiar principle 'that acts which directly burden or obstruct interstate or foreign commerce or its free flow, are within the reach of the congressional power,' the statute was upheld. *National Labor Relations Board v. Jones & Laughlin Steel Corporation, supra*, pp. 31, 32."

Apex Hosiery Company v. Leader, ... U. S. ....., 60 S. Ct. 982, 84 L. ed. 913.

It is therefore respectfully submitted that the Circuit Court erred in not holding that the application of Congressional power over commerce, insofar as the Sherman Act is concerned, has been extended by the recent decisions of this Court to cover not only interstate commerce, as such, but the intrastate activities of these respondents which directly affect such commerce.

CONCLUSION

This brief is submitted by and on behalf of all three petitioner corporations who join in it for the convenience of the Court and the parties without implying joint claims or interests.

In conclusion it is respectfully submitted that the decision of the Circuit Court of Appeals for the Ninth Circuit, affirming the judgment of the District Court sustaining respondents' demurrer and dismissing the complaint, be reversed for the following reasons:

(A) The primary intent of respondents was to accomplish their monopoly by restraining and obstructing the interstate commerce in posters and lithographs.

(B) As a result of respondents' conspiracy and acts

in furtherance thereof, there was a direct restraint upon and monopolization of interstate commerce, whether that commerce be the trade in posters and lithographs or the outdoor advertising business itself, because such business substantially involves interstate commerce.

(C) The scope of the application of the Sherman Act has been extended by the decisions of this Court which hold that Congressional power to protect commerce extends to cover not only interstate commerce, as such, but the intrastate activities of respondents herein which directly affect such interstate commerce.

Dated at Seattle, Washington, October 7, 1940.

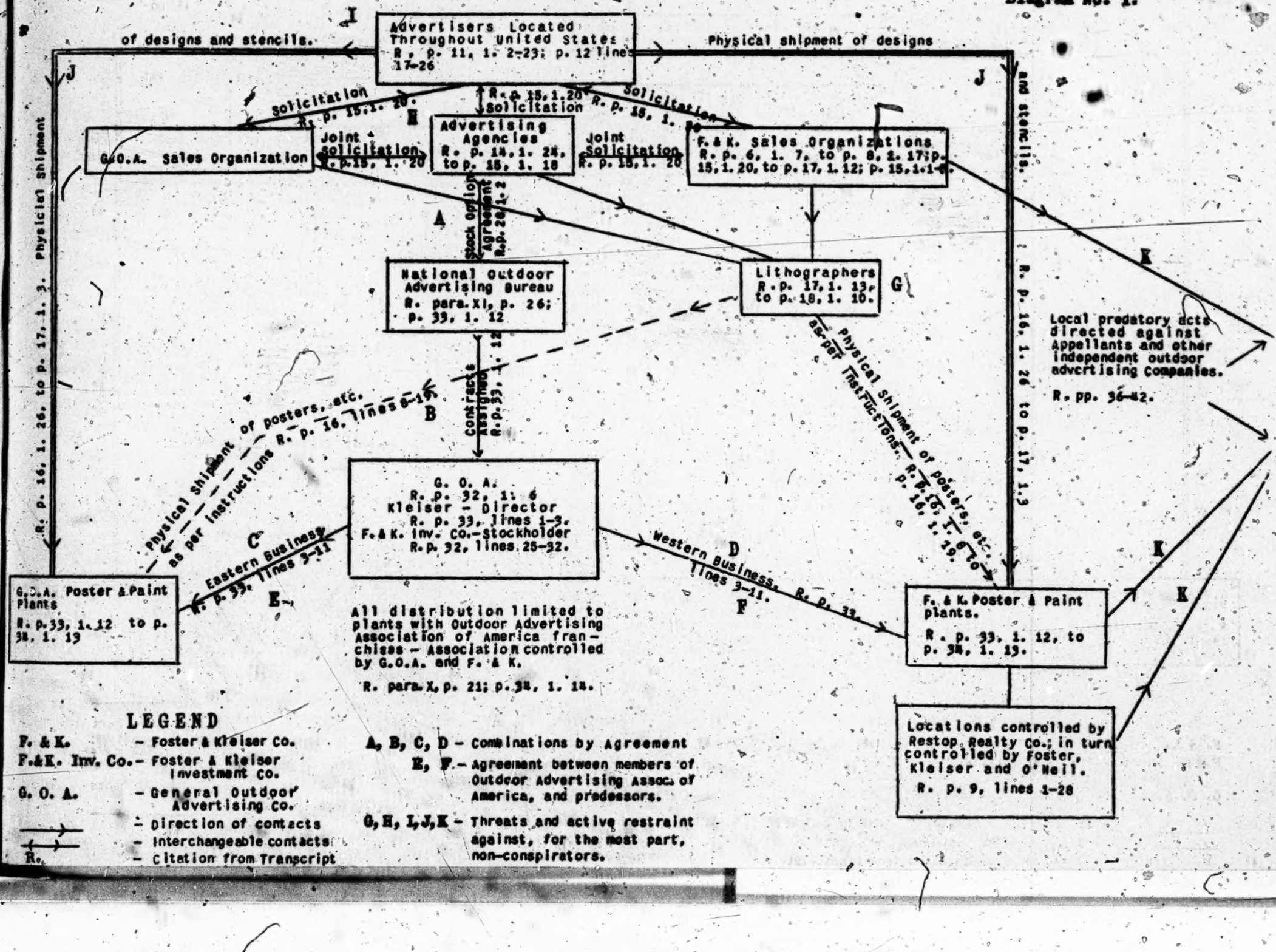
Respectfully submitted,

H. B. JONES,
WHEELER GREY,
Attorneys for Petitioners.

APPENDIX

THE COMBINATION AFTER 1924

Diagram No. 1.



LEGEND

F. & K. – Foster & Kleiser Co.

F.&K. Inv. Co. – Foster & Kleiser Investment Co.

G. O. A. – General Outdoor Advertising Co.

→ – Direction of contacts

↔ – Interchangeable contacts

R. – Citation from Transcript

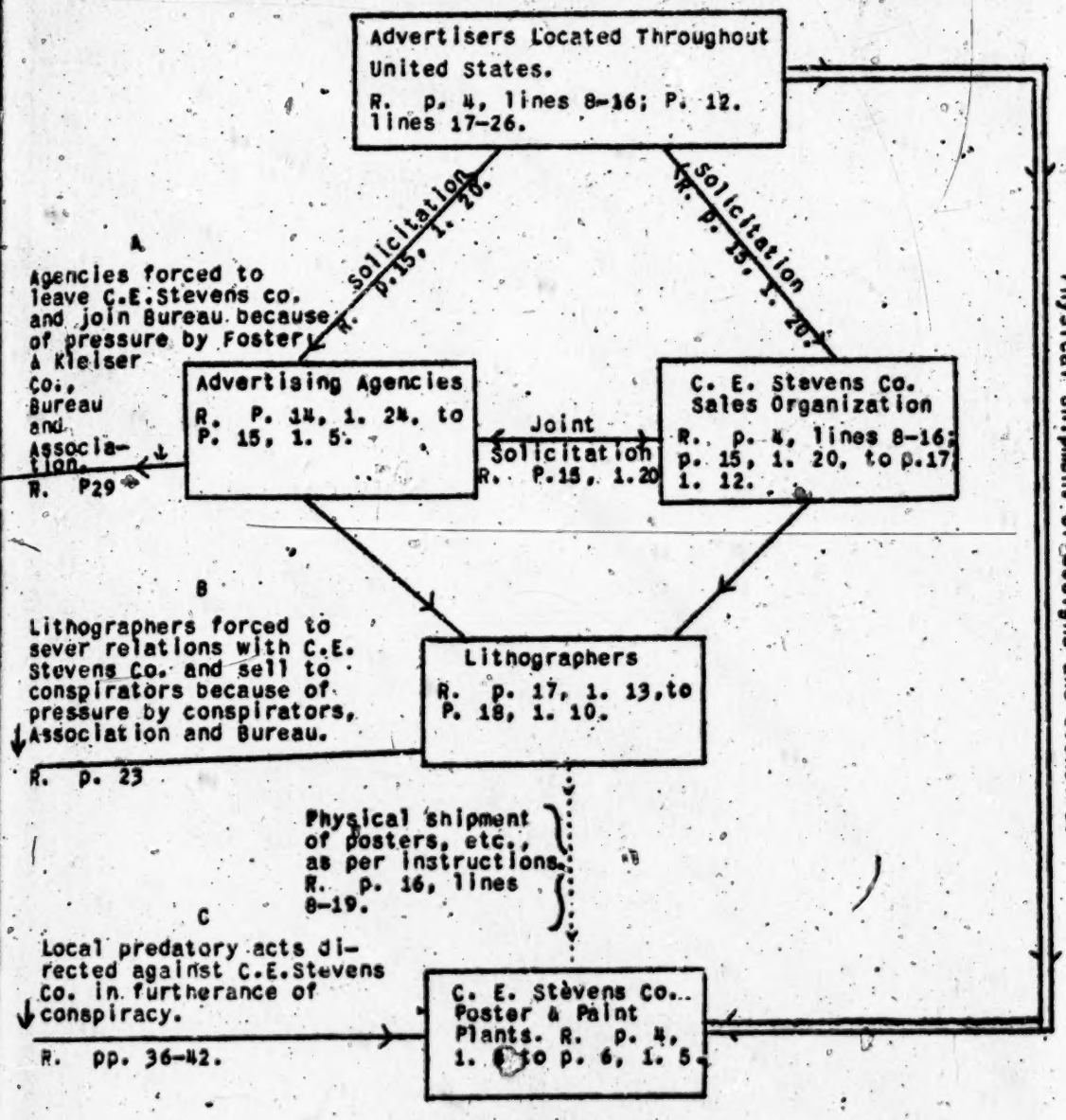
A, B, C, D – Combinations by Agreement

E, F – Agreement between members of Outdoor Advertising Assoc. of America, and predessors.

G, H, I, J, K – Threats and active restraint against, for the most part, non-conspirators.

Diagram No. 2

AN "INDEPENDENT OUTDOOR ADVERTISING BUSINESS



LEGEND

Direction of Contact ——→

Interchangeable Contact ←——→

R. — Citation from Transcript or Record.